

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION
COMMITTEE ON STATE ADMINISTRATION**

Call to Order: By **CHAIRMAN MACK COLE**, on February 18, 1999 at 10:00 A.M., in Room 331 Capitol.

ROLL CALL

Members Present:

Sen. Mack Cole, Chairman (R)
Sen. Don Hargrove, Vice Chairman (R)
Sen. Jon Tester (D)
Sen. Jack Wells (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Keri Burkhardt, Committee Secretary
David Niss, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 471, SB 488, 2/13/1999;
SJ 12, 2/15/1999
Executive Action: SB 228, SB 382, SB 405, SB
455, SB 457, SB 488, SJ 12

HEARING ON SB 488

Sponsor: **SEN. SUE BARTLETT, SD 27, HELENA**

Proponents: **Robert Throssell, Montana Association of Clerk and
Recorders
Sue Haverfield, Flathead County Clerk and
Recorder, Election Administrator
Diane Mellem, Hill County Clerk and Recorder**

Opponents: None

Opening Statement by Sponsor:

{Tape : 1; Side : A; Approx. Time Counter : 9 - 24}

SEN. SUE BARTLETT, SD 27, HELENA, handed out **EXHIBIT(sts40a01), EXHIBIT(sts40a02), and EXHIBIT(sts40a03).** This bill allows for special district elections to be canceled and an appointment made to fill the office in which there are no candidates for the election. If there is a single candidate for an office then the election does not need to be held. The candidate can be elected by acclamation. In a number of special districts, Water and Sewer, Urban Transportation, Park, Fire, Fire Service Areas, Hospital, Conservation, and Irrigation, there are many instances when there are no candidates or only one candidate. Currently, the election still must be held, with exception to the Irrigation and Conservation Districts. The cost of those elections are charged and paid for by the individual district. The outcome may be a number of write-ins. Where there are no candidates, someone may elected by write-in who never wanted to serve and will not serve. They end up with nothing, but they paid money for the election. The one additional piece in this bill is a section that only effects Water and Sewer Districts. This portion says if no one is serving on the Board of Directors for the Water and Sewer District and if there are no candidates in an election, then an election is not needed, but the County Commission can elect an entirely new board to try and start over. Once the new board is appointed they determine the terms, then they go into a regular election process again. There are Water and Sewer Districts in some areas of the state where they have had no Board of Directors and no one ever files to run for a directorship, so those districts have no governance structure. We need to address how to get out of that situation and get a functioning Board of Directors.

Proponents' Testimony:

Robert Throssell, Montana Association of Clerk and Recorders, said the Association and Election Administrators like elections, support elections, and would like people to vote in all elections but this bill addresses a problem that has been experienced statewide. In many of these districts there is no interest and the Election Administrators are required by law to prepare for an election when no candidates have filed. This is an expense that is passed back to these districts. This provides one more step to pull the election package together. If we are going to have to put on a CI-75 election it would be nice to eliminate

elections where there is not any interest. The Election Administrators do not want to prohibit the people in these districts from creating these boards and electing the people they want to these boards but in many districts, interest is not there.

Sue Haverfield, Flathead County Clerk and Recorder, Election Administrator, said nothing is more frustrating to an Election Administrator than to print ballots, advertise an election, and have nobody show up. We would like to eliminate the frustration we feel. Normally people who are interested in serving on these boards will attend the meetings in their own communities, but we send out letters to the non-functioning boards and get no replies. Then we hold an election, no one shows up, and we do not even get a write-in candidate elected. It is time to clean up this law to eliminate the cost to the districts and to eliminate the election. If one person files to serve for one term, the person should be appointed by acclamation rather than going through the process. The election should be eliminated if there are no file candidates so it can go to the appointment process. Generally those appointments would be made on the day the election would have been held, so the person takes office and serves that term as it should have been served.

Questions from Committee Members and Responses:

SEN. HARGROVE asked about the selection of districts in the bill and why they were chosen because there are a lot of other districts as well. **SEN. BARTLETT** explained the districts in the bill are those that are required to hold elections. The other types of boards are generally appointed. They are Solid Waste Districts, Television Districts, Housing Authorities, Museum Boards, County Park Board, County Fair Commission, District Weed Board, Rodent Control Board, Mosquito Control Board, and Cemetery Districts. They are addressed in Section 1 of the bill as boards that are generally appointed. There is a provision in the existing statute that administrative boards, districts, and commissions, may be made elective. In the event any of those are elective, we are adding the language to that piece of the law. She doesn't know of any that are, but the language is a safe guard. **SEN. HARGROVE** stated a Resort Area District would probably always have plenty of people looking for an election.

SEN. TESTER asked what point in time the election is called off. **Joe Kerwin, Deputy of Elections, Secretary of State**, replied it would be once the candidate filing period has closed. At that point they would know how many candidates had filed and then they would make the determination whether to hold the election. **SEN. TESTER** asked if the write-in candidates would be an issue. **Mr.**

Kerwin explained the write-in candidates would not be factored into the equation on determining whether to hold the election or not. If the election was not held there would not be write-ins.

Closing by Sponsor:

SEN. BARTLETT stated this would eliminate the opportunity for someone to be selected by write-in if there are no candidates or one candidate for a position. She had some hesitation when she was first approached about this bill because she believes in the election process, but she knows from her experience as an election administrator she would pursue these districts to get their candidates filed and generally there would only be one per office. This does not preclude the opportunity when there is competition. When there is controversy in a district, there will be more than one candidate filing for those posts and will be well worth having an election.

{Tape : 1; Side : A; Approx. Time Counter : 24 - 50}

SEN. TESTER took over as Acting Chairman.

HEARING ON SB 471

Sponsor: **SEN. MACK COLE, SD 4, HYSHAM**

Proponents: **Mike Foster, Montana Contractors' Association**

Opponents: **Jack Stults, Administrator of Water Resources
Division, Department of Natural Resources
Russ Katherman, Contracting Officer of the
Architecture and Engineering Division, Department
of Administration**

Opening Statement by Sponsor:

SEN. MACK COLE, SD 4, HYSHAM, this bill is designated to tighten the bid war procedure and make them more consistent among agencies. Agencies tend to vary in their procedures to award bids. The lack of consistency is the reason for this bill. One agency may reject a bid simply for a failure to enter a single unit price where it is required, while other agencies decide to waive certain bid imperfections on the basis that it is in the agency's review and public interest to do so. State agencies refer to this as flexibility. That flexibility opens the door for subjectivity, which is contrary to the intent of the competitive bid system. The competitive bid system allows contractors to have one chance at winning a bid. Contractors live in a world of competition and risk and they like tight

rules, so they have an equal and fair opportunity to be the winner. Subjectivity that allows imperfections to be waived subverts the process and leaves contractors with a feeling that rules may not be applied evenly to all bidders. Contractors believe bids should be awarded to low and responsive bidders. This bill ensures the sanctity of the competitive bid system. I am offering a set of amendments that will, hopefully, take care of many of the opponents' concerns. Some of these amendments also clarify the intent of this bill and I am willing to consider other possible amendments. The bill, with the proposed amendments, specifies that construction bids on public works projects must meet certain requirements regarding the matter, such as properly executed bid security, complete unit price information where and when required in the bid documents, authorized signatures when and where required, grounds for rejection of bids, and a penalty to contractors in certain circumstances.

Proponents' Testimony:

Mike Foster, Montana Contractors' Association, handed out amendments, **EXHIBIT(sts40a04)**. The world of a contractor is a highly competitive world driven by risk, responsibility, accountability, and reward. Contractors want a level playing field. They want to understand the rules very clearly, so everyone is subject to all those rules. We have found there are variations from one state agency to another as to what these rules in awarding bids are. The highway contractors that deal with the Department of Transportation are extremely pleased with their process. They have the ability of being electronically driven. The contractors are given a disk that is related to that particular project. They go through it step by step on the disk and if they leave out a unit price, for example, the software is set to send out an alarm. As a result there are very few instances where there are errors in the bid documents. Everyone is on the same level. However, with other agencies there are different levels of flexibility, so the Department can decide whether to accept a bid document based on certain factors. They may overlook the discrepancies in the bid document of the low bidder. They can view this bid as being in the public interest and can allow this document. The point of this bill is to provide consistency. The public interest is a consideration the legislature must make and then provide the state agencies with direction. The benefit to the public provided in the consistency of the competitive bid process will far outweigh the subjectivity that could result from the "flexibility" that exists among some of the agencies.

Opponents' Testimony:

**Jack Stults, Administrator of Water Resources Division,
Department of Natural Resources,** handed out **EXHIBIT(sts40a05)**.

The state of Montana owns thirty-nine dams and three hundred and fifty miles of canals. The dams are highly specialized structures. The number of contractors capable of doing the type of work that is required on a dam rehabilitation project is limited. In their recent projects they have had excellent Montana contractors. Never the less the pool of contractors available is very limited. It is important for us to weigh the elements of the bid to ensure that we are getting the best product and price for the tax payer, while continuing to keep a level playing field between the different competing bids. At the same time we do not want to eliminate our pool of bids. If we follow the structure of this bill we would probably end up without a qualified contractor from Montana. He gave an example of a project where they only had two bids. We reviewed those bids to find which one was the best competitive bid and gave the best product for the best dollar. One of the bids had two minor irregularities. They determined that they were minor because they did not tip the dollar value one way or the other between the two competing bids. They also researched the nature of those irregularities, one of them being a unit price for an item that was listed on the unit price list as a unit and extended price. However, it was a set of doors that operate as a single unit, so whether they are actually two items is a debatable point. The other irregularity was that we did not have a sheet with the bid identifying the person who signed the bid was an authorized agent to sign that bid. That document was on file with the State of Montana but was not included with the packet sent to us. In doing legal research and investigating the history of bidding in state agencies, we found the irregularities have been determined to be minor technical elements that could be waived and would not interfere with the fairness of the bidding. In addition, we could preserve the pool of bidders we had for the project. That bid process was challenged and was taken to District Court and the District Court found in favor of the Department. They found the determination that we made, with respect to those two items, was consistent with our discretion and did not create an unfair or biased awarding of the bid and did not corrupt the process. It is important for there to be some availability in specialized construction to make sure you do not eliminate the pool and can go forward with the project. If you had to go back and rebid on a project that is time sensitive it could be very costly, in many ways, to the tax payers of the state. It is important, especially with specialized construction projects, to maintain the ability under the rules already established by the precedent set in case law, to make a determination as to whether a fact is controlling on the entire bid process. We have not had a chance to fully analyze the amendments but believe they do not take into account any of the concerns we have. There are a couple of

things in the amendments that may make the process even more punitive to the tax payer and to the ability to come up with the best contractor.

Russ Katherman, Contracting Officer of the Architecture and Engineering Division, Department of Administration, explained he believes the amendment solves their concern about bid security. The other major concern has to do with the bidding process. The nature of competitive bidding lends itself to the likelihood of mistakes. Most bids, especially for large projects being assembled at the last minute, tend to have one difficulty or another. We open approximately five and ten bids per month. Typically within those bids, one bidder within that set will have a mistake. One in approximately twelve to fifteen bids the low bidder had some form of irregularity on their form. When that happens I go through a four step process to determine whether or not that actually goes to the material effecting the bid and prejudices that bidder against the others. First, I establish a basic test to evaluate the low bidder's mistake to see if it provides him or her with an unfair advantage. Second, I review case law to determine if the mistake on the bid form has been waived in the past or has been determined by the court to be an informality or irregularity that does not prejudice the bid. Next, I call Purchasing and Printing for the Department of Administration to get that Contracting Officer's opinion of the mistake and what he typically does under similar circumstances. Then I approach the Department of Administration Legal Council for his determination as to whether he thinks it goes to the material effecting the bid. This legislation proposed in Section 2 is confusing to us in some respects even with the amendments proposed. With the amendment, Section 2, Paragraph 1 B, would read, "the unit price, which may not be derived from an extension of the unit price, when for each item required be bid by unit price." Some of that language is confusing. We would like the opportunity to continue to work with the Contractors' Association to come up with language we believe is more workable. Some defects in bids are able to be waived, should be able to be waived, and are in the best interest of the state of Montana. We urge your opposition to this bill in the current form and would like the opportunity to work with the proponents.

Questions from Committee Members and Responses:

SEN. HARGROVE asked if there is a certain amount of discretion in accepting a contract based on the history of the company and some subjective things. **Mr. Katherman** replied he was not sure he fully understands the question, but if it has to do with mistakes

in the proposal form then there is some discretion in case history and the courts have allowed public entities to waive irregularities or informalities. **SEN. HARGROVE** said he has been involved in this. He gave an example. If a company has a history of poor work of defaulting, then can you deny them the contract even if they are the low bidder and fill in all the squares. **Mr. Katherman** said that is correct. We try to evaluate the contractor's financial ability if we have had negative history with them. **SEN. HARGROVE** asked if this bill would effect that ability. **Mr. Katherman** stated the amendments appear to repeat current statute in that regard. We currently have in statute three separate sections that we use to award projects in that manner. The statute does not give us the guidelines as to what constitutes a "responsible" bidder. We have to use past history and current status with the company. **SEN. HARGROVE** said this does not really effect your ability to do that. **Mr. Katherman** stated, I do not believe it does. **SEN. HARGROVE** asked if this would be involved in the Montana preference bid. **Mr. Katherman** replied that current statutes for construction contracts, which we are responsible for, only have a reciprocal preference against a bidder from another state. It does not go to supplies and services contracts. I do not believe this legislation will effect that.

SEN. HARGROVE referred the same question to **Mr. Foster**. **Mr. Foster** stated for a construction project a contractor must get a bond. The bond amounts to an insurance policy that a contractor must buy. The purpose of the bond is for protection. If the contractor does not perform then the agency can take action to get the money associated with the performance bond. In order for a company to get a bond they have to meet the scrutiny of that insurance company. If an insurance company did their job in screening contractors, to see which ones are truly eligible to have a performance bond and which ones are not, then the state agencies would not have to go through this whole screening process of whether or not a contractor is "responsible". **SEN. HARGROVE** said there was some question that this might throw cause bids to an out-of-state contractor as opposed to an instate contractor. **Mr. Foster** stated his industry stands for free enterprise, the competitive bid system, and fair competition. Therefore, their organization would prefer the work be done by Montana contractors. On the other hand, we believe in competition, so if Montana contractors are unable to meet that competition then that is the way it goes.

SEN. TESTER said this bill indicates if certain items are not filled out in the contract bid, they are automatically thrown out of the process. He asked if this was correct.

{Tape : 1; Side : B; Approx. Time Counter : 50 - 69}

SEN. COLE explained this is done to try to get consistency so everyone is on the same field when they are bidding. I was Chairman of the State Management Systems Interim Committee and we got into some of the bidding with computer systems. We have to get our bidding system down so we know we are getting the best contractors. If they do not fill things out, they probably will not get the bid.

SEN. TESTER asked once they request the material, are they allowed to contact you and ask questions about the bid application. **Mr. Katherman** replied we do allow them to contact us. We encourage phone calls concerning the design, the bid form, and any questions concerning insurance and the proposal.

Closing by Sponsor:

SEN. COLE explained there are some amendments. We will probably have some more. I am willing to look at any amendments to make this a better bill where it will improve the contracting system for the state of Montana. It is going to be a different way of doing things for some agencies, but it's important we make it fair for all contractors. I hope with the amendments you will pass this bill.

HEARING ON SJ 12

Sponsor: **SEN. MACK COLE, SD 4, HAVERFIELD**

Proponents: **Chris Tweeten, Chief Counsel, Department of Justice**
Nancy Ellery, Department Health and Human Services
Art Dickhoff, Executive Director, American Cancer Society
Jim Smith, American Cancer Society, Montana
Chapter of the American Lung Association, Montana
Chapter of the American Heart Association
Claudia Clifford, Health Policy Specialist
Representing the State Auditor

Opponents: **None**

Opening Statement by Sponsor:

SEN. MACK COLE, SD 4, HAVERFIELD, said the title of the bill explains it pretty well. It is a "Joint Resolution of the Senate

and the House representing the state of Montana objecting to any attempt by the Federal Government to take from states, territory, commonwealths, and the District of Columbia, any of the proceeds of the tobacco settlement recently reached with the tobacco companies and urging the United States Congress to act to prevent further assertion of that claim". He directed attention to the back of the Resolution. "Be it further resolved that the Secretary of State send copies of this resolution to the President of the United States Senate, Speaker of the United States House of Representatives, and the members of Montana's Congressional Delegation". We have heard a great deal about the large tobacco settlements. We have also heard that this money may not come down to the state and this is the reason for this resolution. It is just one more thing to help the state of Montana get all of the money out of the tobacco settlement. There are a number of Senators and Representatives that have signed their names to this. Hopefully the people in Washington will hear this.

Proponents' Testimony:

Chris Tweeten, Chief Counsel, Montana Department of Justice, handed out **EXHIBIT(sts40a06)**. The Attorney General strongly supports the Resolution and believes it will be helpful for the Montana Legislature to convey to Congress the strong sentiment of the members of this body that the proceeds of the tobacco settlement ought to be preserved for the use of the states and not subject to federal recoupment claims, under the Medicaid Act. There are states that have similar resolutions. The legislative leadership has communicated by letter with our Congressional Delegation and with the Administration on this subject. Many states are taking actions to bring their views to the attention of the Federal Government as Congress mulls over what to do on this issue. Adding this resolution to that chorus will only help bring about the proper resolution of that problem. The second reason I wanted to testify was to provide the committee with some background with relationship to the nature of the federal claim to make sure you understand what jeopardy exists from the Montana settlement. Under the Federal Medicaid Law, under the contracts that the Federal Government enters into with every state that participates in Medicaid, there are provisions that allow for the recoupment by the Federal Government of its share of Medicaid payments in the event that states make recoveries of Medicaid payments. Medicaid is a joint federal and state program. The actual percentages vary from state to state. In Montana, we have one of the higher percentages of federal participation. Our federal participation percentage is around 70 percent. That means for every Medicaid dollar that is expended in Montana, 70 cents of it comes from the Federal Government and 30 cents comes from the tax payers of the State of Montana. Because of this mix

of federal and state funding there are provisions in the law, and in the contract that exists between the states and the Federal Government, that provide for situations where the state recovers Medicaid payments that it has made. The Federal Government is entitled to a share of that recovery. These provisions were intended to cover a couple of different common situations. First, because of a clerical error or miscalculation the Medicaid beneficiary or provider may have been paid more, under Medicaid law, than the law allows. When the state recovers that money the provisions in the law and contracts was designed to allow the Federal Government to get its share of the dollar back. The second situation, in which these recoupment provisions were intended to apply, is a situation in which a Medicaid recipient may have been injured through the fault of someone else. In that situation there are segregation provisions that allow the Medicaid providing agency to step into the shoes of the injured person, sue the party at fault and recover from that party the costs incurred for medical treatment. In that situation, when the state recoups those funds, these provisions were designed to let the Federal Government cover its share of those monies.

The tobacco settlement is fundamentally different from those kinds of situations. The tobacco settlement covers a lawsuit in which the state sought various different kinds of financial recoveries. Not all of the money the state sought was Medicaid related. We did make claims based on the fact that Medicaid expenditures in Montana are 12 million dollars a year higher than they otherwise would be because of illnesses related to tobacco consumption. We also made claims for anti-trust violations that carried with them trouble damages, under Montana anti-trust laws. We made claims for penalties under Montana's Consumer Protection Act, which would have required financial payments by the defendants to the state. We have also made claims on behalf of the Montana employee benefit systems because they pay higher premium costs to cover the illnesses of state and local government employees, caused by consumption of tobacco. Medicaid was not the sole or even the primary reason this case was brought. Even though those damages make up part of the recovery, they do not make up the entire recovery. The Federal Government has informed the states through the Health Care Financing Administration, which is the agency that administers the Medicaid program, they believe they are compelled by existing federal law to pursue recoupment of some share of the state's recovery. It is our understanding from information we have received from federal agencies that the Office of Management and Budget, in preparation of the federal budget, has done what is called scoring, which is a project that they do in making predictions about revenue, similar to what the Tax Committees do during the legislature in making revenue projections for the upcoming budget cycle. They have engaged in a calculation of the likelihood that

this recovery is going to take place and exactly how much money they are going to recover. They have estimated that one half of recoveries of the various states are subject to a federal recoupment claim. They have estimated the likelihood they will succeed in recouping is one in three and they have used those findings in their formula of deciding what revenue is available for purposes of preparing the Federal Budget. This information gives you some indication this is a real problem. A certain portion of Montana's settlement is a risk. We do not know exactly how much. There is some likelihood that the Government may pursue this claim and if they do, they may substantially reduce the amount of money available to Montana as a result of the settlement. There is legislation introduced in Congress on this issue. There is a bill in the Senate sponsored primarily by **CONGRESSMAN HUTCHINSON**, from Texas. **CONGRESSMAN BURNS** is the Co-Sponsor. There is a companion bill in the House that would waive the Federal Medicaid Recoupment Claim. Congress has not acted on that claim yet. The Administration's position on this issue has been that they are willing to agree to a waiver of the recoupment claim if the states agree to dedicate a portion of their recovery to various public health programs. I think that is consistent with some of the legislation that has been introduced in both the Senate and the House regarding the allocation of Montana's tobacco settlement. There is a bill by **REP. BETTY LOU KASTEN** that allocates the settlement with a substantial portion going to public health. There is another bill by **SEN. JOHN BOHLINGER** that does the same thing. There are trust fund proposals that are floating around, but the Administration's position has been as long as the states dedicate a certain portion of their recovery to public health purposes, the Government ought to be willing to weigh this claim. This bill will insist that Montana's voice is heard in Congress on this issue and the Attorney General strongly supports it's adoption.

Nancy Ellery, Department Health and Human Services, said, I strongly support this bill. I am speaking for the Department as well as the Governor. The Governor has a bill, **HB 131**, sponsored by **REP. KASTEN**, that allocates the tobacco settlement. There are many other bills that do the same thing. If there is any federal recoupment it will have a big impact on what we will have to do to meet some state needs in terms of reducing the youth that are smoking, putting some of the money away in a trust fund, and having some money go back to the General Fund. The Governor felt there is some contingency language that addresses the fact that the Federal Government may recoup. This money should be spent in the state as it was a state lawsuit. The Federal Government was not part of the lawsuit. There is going to be strong pressure from all of the states to do this. This resolution sends the right message.

Art Dickhoff, Executive Director, American Cancer Society, said we at the American Cancer Society support this resolution and we hope that it passes. Our delegation in Washington is notified upon the passage of the Resolution.

Jim Smith, American Cancer Society, Montana Chapter of the American Lung Association, and the Montana Chapter of the American Heart Association, stated these three organizations form the nucleus of the Anti-Tobacco Coalition. We are interested in being able to utilize some of these monies to convince children and others in the state to quit using tobacco or never start using tobacco.

Claudia Clifford, Health Policy Specialist Representing the State Auditor, said the State Auditor strongly supports this resolution. He has been supportive of many of the causes that are looking at this as a funding source such as the Children's Health Insurance Plan, tobacco prevention programs, the trust fund that will fund public health needs, and the funding source for insurance of last resort; the Montana Comprehensive Health Association. Many people are looking for funding from the settlement and it would be very unfortunate if the settlement is dramatically decreased.

Closing by Sponsor:

SEN. COLE stated, hopefully, this resolution will help to make sure t we get the funds we are entitled to and they are used for a good purpose.

{Tape : 1; Side : B; Approx. Time Counter : 69 - 87}

EXECUTIVE ACTION ON SB 228

Discussion:

David Niss, Legislative Staff, distributed **EXHIBIT(sts40a07)**. These amendments differ from the ones the committee last saw in two respects. The amendments in Paragraphs 10 and 12 have been reworded to allow for the use of 1998 values for all classes of property for the purposes of an election this year and, also, to allow for use of the 1999 values for elections in 2000 and beyond, for centrally assessed property. The other difference is in Paragraph Fourteen of the amendments. The coordination instruction in Subsection 2 has stayed the same. Subsection 1

has been reversed so that even if **SB 312** and this act passes, **SB 312** controls.

SEN. TESTER asked if the Department of Revenue (DOR) confirmed the first Monday in March would be okay. **Mr. Niss** said they did not confirm the date. They confirmed the opposite. He said **Dolores Cooney, Department of Revenue**, told him this will cause many more ripple effects in other statutes. Those other statutes will need to be amended if this passes. For that reason the **DOR** prefers this bill be taken from this committee and referred to Tax.

SEN. COLE said, I talked with **Mary Bryson** about putting it in Tax but decided, because of the load of tax bills, we should pass it out, send it to the House and DOR would tell us what needed to be changed in it. Whatever needed to be changed in the bill could be changed in the House. **SEN. TESTER** asked if DOR would change the statute or change this bill back to another date. **SEN. COLE** explained, I understand the problem was not the date but the parts of the Montana Code Annotated, MCA's, that would have to be changed.

Mr. Niss further clarified the change in the other statutes would have to be changed but the problem is caused by this date, therefore, it is both.

SEN. TESTER asked if DOR is intending to change the statute or change the date. **SEN. COLE** explained there will be changes that need to be made but they cannot do it right now.

Mr. Niss said, I have not talked to the director. I think their intention is likely to change the statutes to meet the committee's intention to meet the March date. It is a question of how many statutes would have to be changed and what effect that would cause. **SEN. TESTER** stated, I would hope they would change the statutes. I question why they would not be able to get the values for the central assessments as long as the statutes were changed.

Motion/Vote: **SEN. TESTER** moved that **SB 228 BE AMENDED**. Motion carried 5-0.

Motion/Vote: **SEN. TESTER** moved that **SB 228 DO PASS AS AMENDED**. Motion carried 5-0.

EXECUTIVE ACTION ON SB 382

Amendments were distributed to the members, **EXHIBIT(sts40a08)**.

Motion: SEN. WILSON moved that **SB 382 BE AMENDED.**

Discussion:

Mr. Niss explained the amendments. Paragraph One of the amendments changes the interpretation of what kind of a proceeding the bill would apply to. By taking out the "informal or" the bill will not apply to hallway discussions between the supervisor and the employee concerning disciplinary matters. Paragraph Two of the amendments is a continuation of the same idea but once it becomes a formal proceeding it can still fall under the Administrative Procedures Act (APA), under a proceeding before the Board of Personnel Appeals, or some other process defined by statute or agency rule. Therefore, we have narrowed the definition that the bill applies to in one sense by putting it only into the realm of formal proceedings, but it doesn't have to be held pursuant to the APA or statutes that govern proceedings before the Board of Personnel Appeals. There are other types of proceedings that the bill should apply but do not necessarily, governed by the APA or the Board of Personnel Appeals. Paragraph Three, Subsection Four, applies a different procedure for the purposes of elected officials. Elected officials do not report to anyone who can take disciplinary action against them if an allegation has been made against them. The new definition is intended to work with Paragraph Five, Subsection Four of the amendments, in order to define who an elected official is. Paragraph Four of the amendments strikes "mismanagement" because it is too undefined. There are too many theories of management.

{Tape : 2; Side : A; Approx. Time Counter : 87 - 97}

Paragraph Five of the amendments adds three new subsections. The new subsections state how the burden of proof, set out in Subsection One, is satisfied in the context of a proceeding. New Subsection Two shows how the demonstration of evidence is to be made during a proceeding. Subsection Three applies only to directors appointed by the Governor. Subsection Three is similar to Subsection Two except that it says, instead of the APA or a Board of Personnel Appeals Proceeding, the showing by the employee has to be made to the Governor because he is the only supervisor of that state employee. Subsection Four deals with the elected public officials. For elected officials there has to be another procedure because no one supervises an elected official. If an employee complains about retaliation to the Legislative Auditor, the Legislative Auditor makes the investigation of those allegations. Then he prepares a written

report and gives it to the person making the allegations and the person the allegations are made against. The amendment in Paragraph Six explains how the evidence that causes the shift in the burden of proof is presented and to whom. It is presented to a court, a hearing officer, the Board of Personnel Appeals, or to the Governor. The current Subsection Five was taken out because it appeared to say the same thing as Section Nine, which is the notice of disciplinary action against a state employee did not preclude any other remedy that the complaining employee could take. The language that has been included in Paragraph Seven is for a different purpose. It has nothing to do with the subject of the original Subsection Five. Paragraph Seven says the person to whom the allegations have been made and disciplinary action has been taken, has an expectation of privacy in those disciplinary proceedings. The disciplinary action taken against the managerial employee cannot be made public.

SEN. HARGROVE asked for some clarification on the election of remedies. **Mr. Niss** explained an election of remedies is a legal term that says a person can choose one proceeding but not both. There are two provisions, one in the bill and one in the amendments, that address the election of remedies. The first one is Section Nine of the bill that says using a remedy provided in the bill does not prevent the employee from using other remedies. There is no election of remedies for that employee. Paragraph Nine of the amendments adds to the section on the election of remedies. It says in the case of a collective bargaining agreement, if the agreements says that a solution contained in the collective bargaining agreement is chosen by an employee, it becomes the employee's only remedy. This applies only in the case of coverage by a collective bargaining agreement, assuming the collective bargaining agreement provides a remedy. If a remedy is included and is chosen by the employee, that is his election.

SEN. SUE BARTLETT, SD 27, HELENA, explained the overall purpose of the amendments is to narrow and sharpen the focus of what we are doing and to respond to some concerns that were raised during the hearing by the opponents to the bill. The striking of "mismanagement" and the striking of "informal process" helps to sharpen and refine the bill. The provisions about who a person makes a demonstration to in an administrative proceeding does two things. First, it makes it clear and defines how it will be handled. Second, it means someone outside the immediate situation is alerted there has been an allegation of a supervisor retaliation through personnel actions against someone who reported waste, fraud, or abuse of authority. It gets someone in a responsible position in the agency, who is not directly involved in the situation, notified this is going on and gives them the opportunity to correct it. Elected officials are hard

to deal with but the most deadly aspect for an elected official is the publicity that would come. Most elected officials work very hard to avoid even the appearance of an impropriety. The report written by the Legislative Auditor, in the event that there would be any of these instances, would be public information. The Auditor is only required to give it to the employee and the elected official, but at that point it is public information. We also addressed the privacy issue. I have a preference to respect the collective bargaining process. Therefore, I wanted to make it clear in the law that if a person has an election of remedies clause in their collective bargaining agreement, it applies to this statute.

Vote: Motion **carried 5-0.**

Motion: SEN. TESTER moved that **SB 382 DO PASS AS AMENDED.**

Discussion:

SEN. WELLS said, I recall the opponents pointing out they have a tough time getting rid of bad employees sometimes. I experienced some of this in the Air Force and went through the system of dealing with civilian personnel in the Federal Government, where grievances could be filed at the drop of a hat and were by some people who were habitual troublemakers. I like some aspects of the bill because I believe in the Whistle-blower concept when there is fraud, waste, and abuse going on. In the Air Force we had a fraud, waste, and abuse hotline. We also offered a military reward system to people. On the other hand, it bothers me that it gives people the opportunity to make trouble when they do not get along with their supervisor. Both sides have some legitimate comments and the amendments improved the bill.

SEN. WILSON stated, I am going to vote for the bill.

SEN. HARGROVE said, I am concerned about the election of remedies. We keep trying to fix things to make people good managers and we really just add to the bureaucratic involvement. There are many human rights organizations and other people that address these things.

SEN. TESTER stated, I support this bill. In the first half of this session I have had people from agencies give me information and say, "this is only between us." They did not want our conversation to go any further. That is an unfortunate state of affairs. They should have the right to tell the truth.

SEN. WILSON asked if anyone knows what the other states are doing with this issue. **SEN. BARTLETT** said there are about thirty-three

states that have provisions very similar to what is proposed here.

SEN. COLE said, I worked for the Federal Government for many years. We had something similar to this and sometimes it created some problems but there are people who will take advantage of almost anything that comes along. In the civil side of the Federal Government, it did not solve all of the problems but it did provide an outlet for someone who had a Whistle-blower issue.

Vote: Roll call vote was taken. Motion **carried 3-2 with SEN.WELLS and SEN. HARGROVE voting no.**

EXECUTIVE ACTION ON SB 405

Motion/Vote: **SEN. WILSON** moved that **SB 405 DO PASS**. Motion failed 4-1 with **SEN. WILSON** voting aye.

Motion/Vote: **SEN. HARGROVE** moved that **SB 405 BE TABLED**. Motion carried 4-1 with **SEN. WILSON** voting no.

EXECUTIVE ACTION ON SB 455

Amendments were distributed to committee, **EXHIBIT(sts40a09)**.

Motion/Vote: **SEN. WILSON** moved that **SB 455 BE AMENDED**. Motion carried 5-0.

Motion/Vote: **SEN. WILSON** moved that **SB 455 DO PASS AS AMENDED**. Motion carried 5-0.

EXECUTIVE ACTION ON SB 457

Motion/Vote: **SEN. TESTER** moved **SB 457 DO PASS**. Motion carried 5-0.

EXECUTIVE ACTION ON SB 488

Motion/Vote: SEN. WILSON moved that SB 488 DO PASS. Motion carried 5-0.

EXECUTIVE ACTION ON SJR 12

Motion/Vote: SEN. TESTER moved that SJR 12 DO PASS. Motion carried 5-0.

ADJOURNMENT

Adjournment: 12:07 P.M.

SEN. MACK COLE, Chairman

KERI BURKHARDT, Secretary

MC/KB

EXHIBIT (sts40aad)